DATE: AUGUST 30, 1995

CASE NO: 93-INA-333

In the Matter of

CAPRICORN SYSTEMS, INC.
Employer

on behalf of

SATISH CHAND
Alien

Before: Clarke, Jarvis, and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. §656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182(a)(14)(1990)("Act"). The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.) Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage

and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer, Capricorn Systems, Inc., submitted an Application for Labor Certification on behalf of the Alien, Satish Chand, on August 3, 1992, for the position of Systems Analyst (AF 47-122). Minimum requirements for the position included a Bachelor's degree in Information Systems or Computer Science, and 2 years experience in software development (AF 67). In the Statement of Qualifications, the Alien was reported to have a Bachelor's degree in Electrical Engineering and a Master's degree in Information Systems, as well as 1 year experience as a Programmer Analyst and a 3-month summer internship in the Information Systems Department of an insurance company (AF 68-68A).

In his Notice of Findings,("NOF"), dated March 23, 1993, the CO proposed to deny the Employer's Application (AF 39-45). The CO noted a discrepancy between the minimum requirement of 2 years experience listed on the Application (AF 68-68A), and a written explanation of the position to the State Job Service which specified only 1-2 years experience (AF 71-72). The Alien was noted to have obtained both experience and computer skills required by the Employer while working in the job for which certification is being sought (AF 42-43). The CO further determined that qualified U.S. workers had not been rejected for lawful, job-related reasons (AF 43). The Employer submitted its rebuttal on April 27, 1993 (AF 20-38A).

The CO, in his Final Determination dated May 13, 1993, denied the Employer's Application for Labor Certification (AF 12-18A). The Employer filed a timely request for Administrative Review before this Board on June 15, 1993, and a Brief in Support on August 3, 1993 (AF 1-11). The Employer also filed a Motion to Remand to Amend the ETA 750, Part A and Consider New Evidence on August 3, 1993.

DISCUSSION

As indicated, Employer filed a Motion to Remand.

In Universal Energy Systems, Inc., 88-INA-5 (Jan 4, 1989) (en banc) the Board held that:

> We first address Employer's Motion to Remand. Under the regulations which govern labor certification cases, one of the proper resolutions available to BALCA is to remand the case to the Certifying Officer for further consideration or factfinding and determination. 20 CFR Section 656.27(c)(3). While an employer may properly argue in its appeal on the merits that the case should be remanded, a separate motion to remand is superfluous. Accordingly, we will determine within our consideration of the appeal on the merits whether remand is proper. In so doing, we note that we may not consider new evidence submitted with Employer's brief, see In the Matter of University of Texas at San Antonio, 88-INA-71 (May 9, 1988), and find that the same holds true for new evidence submitted with Employer's Motion to Remand.[1]

Employer's request for remand will be considered in the discussion of the merits of this case.

The Employer has stated that the actual minimum requirement for the job is 2 years experience in software development (Employer's Brief at Point 1A). The Employer has also set forth an educational requirement of a Bachelor's degree in Information Systems or Computer Science (AF 67).

The Alien has reported a Bachelor's degree in Electrical Engineering and a Master's degree in Information Systems. (AF 68). In Part A of the Form 750, Employer included in the job description that an applicant was required to "Analyze, design, develop, test and maintain application software on mainframes and Local Area Networks using C/Ctt, Microsoft Windows Software Development Kit, Toolbook, or other Graphical User Interface development environment." (AF 31). Although Part B of the Form 750 indicates that the Alien has over two years experience which could be construed as software development, it does not show two years in the job offered. It does not show the specific experience in the job offered as specified in the job description. U.S. applicants were rejected for not having the specific experience. (AF 88, 92, 96).

---

[1] We note that the Notice sent by the Board to Appellants had a section dealing with "Motions To Remand". In the light of the holding in Universal Energy Systems, that section is being deleted from the Notice.

Employer argues that in determining Alien's experience, credit should be given for course work taken in obtaining his Master's degree (Employer's Brief at Point 1, B). An employer must establish that the alien possesses the stated minimum requirements for the position. Charley Brown's, 90-INA-345 (Sept. 17, 1991). Here, Alien's Bachelor's degree is in an unrelated field to the offered position, and Employer does not argue that it is equivalent. It is therefore not considered. Alien's Master's degree in Information Systems has gained the tacit approval of the CO as an equivalent degree, and we agree that this degree establishes Alien's possession of the minimal educational requirement for the job.

The issue to be determined therefore becomes whether the Alien's post-secondary degree may serve double duty as part of the required experience as well. We find that it may not.

In all aspects of this Application, the two requirements of experience and education have been separate. In the Form ETA 750 Part A, education and experience requirements are separate items (AF 67). The recruitment advertisement requires a degree **plus** 2 years experience (AF 47B). In the Employer's rejection letters to the U.S. Applicants, the Employer explicitly states that they are looking for an analyst with a degree **and** 2 years experience (AF 84, 88, 92, 96).

An employer may not require more experience of U.S. workers than the alien possesses. Western Overseas Trade and Development Corp., 87-INA-640 (Jan. 27, 1988). Where the alien does not meet the employer's stated job requirements, certification is properly denied under Section 656.21(b)(6). Marston & Marston, Inc., 90-INA-373 (Jan. 7, 1992). Here, the Alien does not have the 2 years experience required of the U.S. workers who applied for the position. Certification is properly denied in these circumstances.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this ___ day of _____, 1995.

For the Panel:

_____
DONALD B. JARVIS
Administrative Law Judge

Judge Joel Williams concurs in the result.